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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress "inadvertently fail" to exclude from regulation under §510 of ERISA a railroad employer's interference with its employees' right to receive pension benefits earned and accumulated under the Railroad Retirement Act of 1974?

a. If Congress did commit such an "inadvertent" failure, did any court have the power to correct such an oversight by grafting its vision of the legislative intention onto the plain language defining an excluded "government plan" when the pertinent exclusionary and definitional sections in ERISA were amended numerous times after enactment of the 1974 Railroad Retirement Act but Congress retained unchanged the definition of an excluded "government plan"?

2. Does a non-profit voluntary association of former employees organized to conduct litigation as a means of political advocacy have associational standing to sue to recover pension and health and welfare benefits due to its members when the association possesses their claims pursuant to irrevocable assignments, represents them under explicit and detailed powers of attorney given by the employees-beneficiaries, functions under a detailed state law, and when conducting the litigation with an association as the plaintiff is administratively convenient?

a. Does denial of standing to such a group organized for political advocacy through litigation violate any First Amendment guarantees?

3. Do allegations by employee-beneficiaries of a health and welfare benefit plan that their employer's parent company forced their employer to discharge them and to contract out their jobs to another employer in furtherance of a conspiracy to

interfere with their right to receive health and welfare benefits, state a cognizable cause of action under §510 of ERISA?

LIST OF PARTIES TO PROCEEDING

Inter-Modal Rail Employees Association, and, in the alternative, Thomas Franks, Charles Jones, Tommy Martin, Hoyt Jarrard, and Robert Stein, filed this action against The Atchison, Topeka and Santa Fe Railway Company; Santa Fe Terminal Services, Inc.; Santa Fe Pacific Corporation; and In-Terminal Services Division of Mi-Jack Products, Inc.

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CITATION TO LOWER COURT OPINIONS AND ORDERS

Court of Appeals: *Inter-Modal Rail Emp. Ass'n v. Atchison, Topeka*, 80 F.3d 348 (9th Cir. 1996), Case No. 93-56400.

District Court: no citations, Central District of California Case No. CV-92-06623-WJR.

STATEMENT OF BASIS FOR JURISDICTION

The Court of Appeals entered its decision on March 27, 1996. A timely Petition for Rehearing and Suggestion for Hearing En Banc was filed. The Court of Appeals ordered Defendants to respond to that Petition. On June 24, 1996, the Court of Appeals denied the Petition and rejected the Suggestion for Rehearing En Banc.

Petitioners believe that 28 U.S.C. §1254(1) confers on this Court jurisdiction to review on a writ of certiorari the judgment of the Ninth Circuit.

STATUTES INVOLVED IN THE CASE

29 U.S.C. §1002(1): The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program ... established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or

hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits.

29 U.S.C. §1002(3): The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. §1002(32): The term "government plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act.

29 U.S.C. §1003(b): The provisions of this subchapter shall not apply to any employee benefit plan if -- (1) such plan is a governmental plan.

29 U.S.C. §1140: It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

STATEMENT OF THE CASE

This case presents at least three issues that are ripe for review by the Court. Any of these questions by itself would merit a grant of certiorari. The suit was filed by Inter-Modal Rail Employees Association ("IMREA") in the district court under federal question jurisdiction, 28 U.S.C. §1331. IMREA is a nonprofit mutual benefit corporation organized under California law by over 200 former employees. Its primary purposes are concerted political advocacy for workers' rights and the conduct of this litigation to advance such goals while seeking to recover pension and health and welfare benefits due to its members. IMREA holds the claims of its members pursuant to assignments and powers of attorney (App. 3).[1] Once those benefits are recovered through litigation, IMREA is required under its by-laws and the assignments and powers of attorney given to Petitioner Association by all of its members to pay all benefits recovered over to them, less stipulated attorneys' fees and litigation costs incurred.

Alternatively, the board of directors of Petitioner Association, comprised of five of these former employees, sought to be certified as class representatives of the Association's members in the event that any court might find it was not a proper party (App. 4-5). The directors and all other members of IMREA were Santa Fe Teamsters, specifically truck drivers, crane operators and cargo handlers who were involved in loading and unloading railcars and trucks.

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[1] All citations to the record before the appeals court are made as "App."

IMREA's first cause of action is under §510 of ERISA, 29 U.S.C. §1140. It alleged on behalf of its members that Respondent Atchison, Topeka & Santa Fe Railway, acting through its wholly owned subsidiary Respondent Santa Fe Terminal Services (collectively "Santa Fe") and in conspiracy with Respondent In-Terminal Services Division ("ITS"), interfered with the employees rights to receive benefits under the Railroad Retirement Act (RRA) of 1974, and under the Teamsters Union pension and health and welfare plans (App. 10-13). IMREA also filed a claim on behalf of its members for damages under the Federal Employers Liability Act (FELA), 45 U.S.C. §51, *et seq.* (App. 13-17). The court of appeals remanded for further consideration on suitability for class-action treatment. This claim is implicated by the denial of associational standing, *see infra* at 5 and Section III, since it is unclear if Petitioner Association may be a representative of the possible class.

Petitioner alleged that Respondents Santa Fe developed a scheme whereby the Railway (AT & SF) withdrew its so-called "contract" to perform inter-modal services at its Los Angeles railyard from its wholly owned subsidiary, Respondent Santa Fe Terminal Services, which had been found to be a "railroad" employer under the RRA of 1974. In fact, Santa Fe never before had used a contract between parent and subsidiary for performance of the inter-modal work. Respondents Santa Fe thus replaced themselves with Respondent ITS, a non-railroad employer, which then performed the same inter-modal work at the Santa Fe railyard with the same Santa Fe equipment and vehicles. Under their scheme, Respondents Santa Fe discharged all of the subsidiary's "railroad" employees, including the members of IMREA. The Association alleged that the purpose of this plan was illegal and violated ERISA since it was formulated and implemented with the specific intent to interfere

with and deprive IMREA's members of their right to receive pension benefits under the RRA of 1974 and under retirement and health and welfare benefit plans of the Teamsters' Union (App. 6-13). Santa Fe's intent to escape payment of contributions required by the Railroad Retirement Board for "railroad" employees was explicitly documented in a sworn declaration made by the president of the Santa Fe subsidiary (App. 59-62).

The district court granted Respondents' motion to dismiss each and every claim under §510 of ERISA for interference with the various employee benefits (App. 28-29).

The *per curiam* opinion of a panel of the court of appeals first held that IMREA lacked standing to bring suit on the ERISA and FELA claims on its members' behalf. The court reasoned that "to establish the individualized damages sought in both the ERISA and FELA claims, each employee member would have to participate in the lawsuit." 80 F.3d at 350. This decision, of course, was made without the benefit of this Court's magisterial decision on associational standing, *UFCW v. Brown Group*, 116 S.Ct. 1529 (1996), entered shortly after. The appeals court *sua sponte* raised for the first time any issue about the associational standing of IMREA. No Respondent had argued in the district court or the court of appeals that IMREA lacked associational standing. Thus, Petitioner never had an opportunity to argue the constitutional objections to the standing determination, i.e., that denying IMREA associational standing infringed on the members' rights of free association, speech, and petition, or the other considerations which favored standing.

The appeals court reversed the district court's dismissal of the §510 claim against each Defendant for conspiracy to

interfere with the employees' Teamster pension benefits. 80 F.3d at 350-51. The Ninth Circuit, however, upheld the dismissal of the claims for interference with RRA pension benefits and Teamster welfare benefits. *Id.* at 351-52.

The appeals court found that under its decisions claims for interference with the right to receive health and welfare benefits are not cognizable under ERISA since those benefits do not vest, and employees supposedly thus have no present right to receive them. *Id.* at 351. The appeals court recognized that its holding conflicts with decisions of the Seventh and Eleventh Circuits. *Id.* at 351, n.6. Furthermore, the appeals court's opinion on this issue failed to consider this Court's decision in *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996), rendered shortly before then which upheld a claim under §510 of ERISA for interference with the right to receive health and welfare benefits.

In rejecting Petitioner's claim under ERISA for interference with the right to receive benefits mandated by the RRA of 1974, the Ninth Circuit held that Congress "inadvertent[ly] fail[ed]" to include the 1974 RRA within the exemption from regulation for any "government plan." *Id.* at 351. Congress defined "government plan" in §3(32) of ERISA "to include any plan to which the Railroad Retirement Act of 1935 or 1937 applies". Thus, the appeals court's decision conflicted squarely with the plain language of the statute. It ignored controlling precedents of the Court on legislative interpretation, such as *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138 (1991) and *Massachusetts Mutual v. Russell*, 473 U.S. 134, 105 S.Ct. 3085 (1985). The decision below thus presents three major clusters of issues that are of compelling significance and ripe for review. Any one of these issues by itself will suffice for the grant of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF ERISA WHICH DOES NOT EXCLUDE CLAIMS FOR INTERFERENCE WITH BENEFITS UNDER THE RAILROAD RETIREMENT ACT OF 1974.

The *per curiam* opinion below conflicts with the plain language of ERISA on the question whether interference with the right of employees to receive railroad retirement benefits, under the Railroad Retirement Act of 1974 ("the 1974 Act") is actionable under ERISA. Excluded by its terms from ERISA is any "government plan." 29 U.S.C. §1003(b)(1). ERISA states that "[t]he term government plan also includes any plan to which the Railroad Retirement Act of *1935 or 1937* applies, and which is financed by contributions required under that Act." 29 U.S.C. §1002(32) (emphasis added). Despite numerous amendments to the definitional section in ERISA since the 1974 Act was signed into law, Congress has never chosen to include the 1974 Act within the exclusion from ERISA's remedial scheme. Yet the district court and the court of appeals had no hesitation in so legislating.

The opinion found that Congress "inadvertent[ly] fail[ed] to specifically identify" the 1974 Act in §1002. 80 F.3d at 351. And the Congress' failure was "understandable" because the 1974 Act was enacted a few weeks after ERISA. *Id.* at 352. Congress, however, amended the definitional section at least nine times after the 1974 Act was passed, but never placed the 1974 Act in the exclusion provision. The courts are not

permitted to assume that Congress inadvertently omitted a particular portion of a statute. *Massachusetts Mutual v. Russell*, 473 U.S. 134, 143, 105 S.Ct. 3085, 3092 (1985) (finding the "assumption of an inadvertent omission" in ERISA "especially suspect") and *West Virg. Univ. Hosp. v. Casey*, 499 U.S. 83, 101, 111 S.Ct. 1138 (1991) ("to supply omissions [in a statute] transcends the judicial function") (quoting Brandeis, J.).

In *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996), the Court broadly interpreted ERISA's remedial section to provide wronged employees with a direct remedy under that statute when their employer bilked then of welfare and health benefits. The Court found that

> ERISA's basic purposes favor a reading of the third subsection [§1132(a)(3)] that provides the plaintiffs with a remedy. The statute itself says that it seeks "to protect...the interests of participants...and...beneficiaries...by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... providing for appropriate remedies ... and *ready access to the Federal courts*".

116 S.Ct. at 1078 (emphasis added). Under the circuit court's interpretation of ERISA, however, employees have no access to a Federal court to obtain a remedy for any wrongful interference, no matter how intentional, with their right to receive benefits under the Railroad Retirement Act of 1974. That conflicts with the specific intent of ERISA as interpreted by this Court. Yet, perhaps paradoxically, the appeals court's decision also contravenes the priciples of the dissenting justices in *Varity* who followed the teachings of Justice Scalia in regard to "plain language" interpretation of Congressional intent. *Id.* at

1081-82, 1085-86 (Thomas, J., dissenting). The opinion below reached a perverse result from the standpoint of public policy, and it did so for a perverse reason under principles of statutory construction. Its scanty reasoning offends the holdings of both the majority and the dissent in *Varity*.

There are valid policy reasons to believe the Congress rationally intended that interference with benefits under the 1974 Railroad Retirement Act should fall within the regulatory sweep of ERISA. In 1974 ERISA was a newly enacted, all-encompassing scheme to regulate the provision of employment benefits. The Railroad Retirement Act of 1974 was contemporaneous legislation addressing a particular aspect of the same concerns, and already had been reported out for favorable action by the committees of Congress. *See* S. Rep. No. 93-129, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 4838 (ERISA) and S. Rep. No. 93-1163, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 5702 (RRA). In its efforts to address such policy issues as underfunding, poorly-administered plans, failures to pay benefits, and interference with rights to benefits, Congress very well could have decided rationally that it would further its purposes by drawing a distinction between the old 1935 and 1937 Railroad Retirement Acts and the forthcoming Act of 1974. By carefully defining the "governmental plan" exemption in language drafted to exclude the forthcoming (not yet finally approved) new Railroad Retirement Act of 1974, Congress rationally chose to include "railroad" employers' prospective operations within the ERISA regulatory scheme.

Obviously Congress in 1974 was concerned about the protection of railroad workers' pension rights, as the Court noted in *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S.Ct. 453 (1980). Congress did not suggest in the

legislative history of the RRA or that of ERISA, that it intended either to authorize private "railroad" employers to interfere with their workers' pension rights or to rely upon this class of employers alone among all private employers to treat their employees well of their own volition. Once the Railroad Retirement Act of 1974 had been enacted, operations under the 1935 and 1937 Acts were to be restricted to administration, investment, calculation and disbursement of already-contributed funds by the Railroad Retirement Board, a government agency. So the Congressional drafters reasonably exempted those old Acts as "governmental" plans, while including within the sweep of the newly-enacted ERISA statute the prospective operations of private "railroad" employers under the forthcoming 1974 Act. The court of appeals inference with a legitimate Congressional policy choice is heightened by the omission of any specific pension-interference language from the contemporaneously drafted 1974 Railroad Retirement Act.

Congress rationally could well have believed that ERISA should not govern issues relating to pre-1974 acts of interference with retirement benefits or contributions under the 1935 and 1937 Railroad Retirement Acts, but that like issues under the 1974 Railroad Retirement Act should be regulated by ERISA's more comprehensive statutory scheme. That was a decision for Congress to make, not one for any Court to supply after the fact. Providing wronged "railroad employees" with a federal court remedy under ERISA for their employer's actions to intentionally cut off their eligibility for railroad retirement benefits does not interfere with the jurisdiction of the Railroad Retirement Board to perform its statutory mandates relating to the funding or payment of benefits. Providing these wronged "railroad" employees with an ERISA remedy is not repugnant to the Congressional intent under ERISA, and creates no conflict between these statutes. This is especially true since the Railroad

Retirement Board is imbued with no remedial powers to make whole wronged employees as the federal courts are empowered to do under ERISA.

II.

THE COURT OF APPEALS' DECISION THAT PLAINTIFF DID NOT STATE A CLAIM UNDER ERISA FOR INTERFERENCE WITH THE RIGHT TO RECEIVE HEALTH AND WELFARE BENEFITS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND TWO COURTS OF APPEAL.

In *Varity Corp. v. Howe*, *supra*, the employees sued under ERISA for breaches of fiduciary duties by their former employer and the company that controlled their former employer. The employees alleged that they were induced to switch from their old employer to a new company by fraudulent misrepresentations that their health and welfare and pension benefits would not be affected and that the new company would be sound. 116 S.Ct. at 1068-69. In fact, Varity planned that Massey Combines would fail and that Massey Ferguson would be released from various debts, including "promises to pay medical and other non-pension benefits". *Id.* In its second year of operation, Massey Combines ended up in receivership "under which the employees lost their non-pension benefits". *Id.*

This Court held that the employees had the right to sue under ERISA for violations of ERISA-imposed fiduciary obligations to administer the health and welfare benefit plan solely in the interests of the employee beneficiaries. The Court found that the employees' claim existed by virtue of §502(a)(3)

of ERISA, providing for the recovery of "other appropriate equitable relief," 29 U.S.C. §1132(a)(3).[2]

While the Court did not precisely address the question presented here, *Varity* stands for the rule that employees may sue under ERISA for wrongful interference with the right to receive health and welfare benefits. But the court of appeals held that such benefits are beyond the reach of an ERISA interference action. Such is contrary to the rule in at least two other circuits, as the Ninth Circuit noted in footnote 6 to its *per curiam* opinion. In *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993), *cert. den.*, 114 S.Ct. 308 (1994), the Eleventh Circuit held that an employee who had been fired because she refused to convert her job status to an independent contractor, with a loss of non-vested health insurance coverage, stated a claim under §510 of ERISA for "discharge...for the purpose of interfering with the *attainment of any right* to which such participant *may become entitled* under the plan" (emphasis supplied). In *Heath v. Varity Corp.*, 71 F.3d 256 (7th Cir. 1995), the Seventh Circuit found actionable under §510 interference with non-vested benefits through discharge from employment.

If Congress had any intent to exclude from actions under §510 interference with the right to receive health and welfare benefits, or any other non-vested benefits, it could have stated so in the statute, or at least in the legislative history. Neither the appeals court nor Respondents have cited any provision of the statute or its history which compels such a narrow reading of

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[2]The district court in *Varity* had ordered that the employees be reinstated into the Massey Ferguson health and welfare plan, and ordered payment of "certain monetary relief" that was not at issue before the Court. 116 S.Ct. at 1069.

this remedial statute. Indeed, by its plain language §510 expressly prohibits employers from discharging employees "for exercising any right to which he is entitled under the provisions of an employee benefit plan...or for the purpose of interfering with the *attainment* of any right to which such participant *may become entitled* under the plan" (emphasis added). The highlighted portions of the second clause strongly indicate that the statute prohibits interference with the attainment of future employee benefits, particularly when read along with the first phrase which speaks in the present tense.[3] Moreover, §3(1) and §3(3) of ERISA by their plain language define the term "employee benefit plan" to include plans providing health and welfare benefits. 29 U.S.C. §1002(1) and (3). So the distinction between such benefits and pensions is an anomaly under the obvious intent of Congress.

The *per curiam* opinion below thus conflicts with the teachings of *Varity* and the holdings of the Seventh and Eleventh Circuits. Certiorari should be granted to resolve this conflict, as well as the conflict between the plain language of Congress and the anomalous distinction drawn by the court of appeals between pension benefits and health and welfare benefits.

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[3]In another context, this Court has indicated that the word "may" means "contingency or liability, or possibility or probability." *U.S. v. Lexington Mill*, 232 U.S. 399, 411, 34 S.Ct. 337 (1914). Webster's defines the word "become," in one of its meanings, as "to pass from one state to another; to enter into some state or condition, by a change from another state or condition, or by assuming or receiving new properties or qualities, additional matter, or a new character ..., to come into being." *Webster's New Universal Unabridged Dictionary* p. 164 (2d ed. 1983).

III.

THE *SUA SPONTE* RULING THAT IMREA DOES NOT HAVE ASSOCIATIONAL STANDING TO SUE CONFLICTS WITH THIS COURT'S *BROWN GROUP* DECISION, INTERFERES WITH THE FIRST AMENDMENT RIGHTS OF THE ASSOCIATION'S MEMBERS, AND OVERLOOKS THE CRITICAL FACTS THAT IMREA HOLDS THE CLAIMS OF ITS MEMBERS PURSUANT TO IRREVOCABLE ASSIGNMENTS AND REPRESENTS THEM UNDER EXPRESS POWERS OF ATTORNEY.

Very recently, in *UFCW v. Brown Group*, 116 S.Ct. 1529 (1996), this Court unanimously revised the law of associational standing. In that case, a local union filed suit on behalf of its members for back pay under the WARN Act, 29 U.S.C. §§2101 *et seq*. The employer argued that the association (a labor union) itself must have suffered injury to have standing to sue and thus, since the union was not injured, the union members would have to appear individually in the case. Following this Court's previous standing decisions, the district court and the court of appeals there had ruled that the union did not have associational standing. But the Court reversed.

Although the Court reaffirmed its three-prong associational standing test,[4] it held that an association need satisfy only the first two prongs to meet the constitutional requirements of case and controversy in Article III and thus have standing to sue for members' damages.

> [O]nce an association has satisfied *Hunt's* first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more.

116 S.Ct. at 1536. The Court held that the third prong of the test has analytical or "prudential" value by "focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *Id*.

But the *per curiam* decision of the court of appeals here reflexively and without analysis simply found no standing. Since it reached the conclusion *sua sponte* there was no development of the issue. Neither the district court nor any defendant had raised this point below. There was no focus upon the factual record, Petitioners' Complaint, of several key factual distinctions that militated for associational standing. The directors are all themselves part of the affected group of former employees. The Association is organized as a non-profit corporation under a California statute that requires precise ethical standards and organizational guarantees. Cal. Corp. Code §7230 *et seq*. All members including the directors have assigned their rights

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[4]*See Hunt v. Washington State Apple Advt. Com'n.*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977).

irrevocably to their Association. The Association acts on their behalf under extensive, specific powers of attorney (App. 3). The Association was formed out of the members' wishes to redeem more effectively their First Amendment rights. *Id.* at 3-5.

The Court in *Brown Group* found that the district court's inquiry under the third prong must focus on whether statutory or common law recognizes "in certain circumstances, particular relationships ... are sufficient to rebut the background presumption ... that litigants may not assert the rights of absent third parties". 116 S.Ct. at 1536. Under this new approach, the district court should examine whether an association will have records or evidence to support damages claims, and whether the damages will find their way into the pockets of its members. *Id.* This Association has such evidence, and the "particular relationships" of Petitioner's members to it are more than sufficient. *See, e.g., Weiner v. Mullaney*, 59 Cal.App.2d 620, 638 (1943).

The Court noted that many federal laws, including the FLSA and class action rules, as well as common law *parens patriae* suits and executor's actions "permit one person to sue on behalf of another, **even where damages are sought**". *Id.* at 1536-37 (emphasis added). Thus, the fact that individual members of an association may need to participate in a case to establish claims for individualized damages, as under WARN, does not prevent that association from filing suit.

Under the *Brown Group* standard, IMREA clearly should enjoy associational standing. IMREA satisfies the test's first two prongs. Its members otherwise have standing to sue for their lost pension and health and welfare benefits. Promoting the interests of its members in obtaining recovery of their lost

wages and pension benefits is one of IMREA's purposes declared in its bylaws and alleged in the Complaint (App. 3). The California mutual benefit corporation law under which IMREA exists permits Petitioner to undertake "any lawful purpose" and affords it "all of the powers of a natural person," including the right to sue and be sued. Cal. Corp. Code §§7111 and 7140, and *Santa Clara County Contractors & Homebuilders Assoc. v. City of Santa Clara*, 232 Cal.App.2d 564, 570 (1965).

As for the third prong, proceeding with one "plaintiff" in this action promotes administrative convenience without sacrificing adversarial intensity or the ability to obtain evidence. It tends to guarantee that IMREA's members will recover their pensions and other losses at a lower cost for attorneys' fees and litigation expenses and without inconsistent results. If this issue had been developed before the *per curiam* panel sprung it *sua sponte*, Petitioner could have shown that it will not keep any portion of the recovery it obtains for its members.

In short, no meritorious reason exists why IMREA should not have the same associational standing as did the UFCW union in *Brown Group*. IMREA very likely represents its members' interests more closely than do most unions. IMREA's directors are among the affected employees, and have themselves assigned their claims to their Association. By contrast, salaried bureaucracies somewhat removed from their actual employees, head most unions.

Denying IMREA associational standing tramples upon the First Amendment freedoms of association, speech and petition of its members. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 612 (1972), the Court held that

> it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the anti-trust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests.

In NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963) the Court struck down a Virginia law that had the effect of prohibiting the NAACP from referring or recommending that aggrieved persons retain an NAACP attorney. The Court found that the law violated the First Amendment rights of freedom to associate and of free speech since it, "**at least potentially**, prohibits every cooperative activity that would make advocacy of litigation meaningful." 371 U.S. at 437-38 (emphasis supplied). Further, the Court held that "only a compelling state interest in the regulation of a subject ... can justify limiting First Amendment freedoms." *Id.* at 438. In *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 1171 (1958), the Court held that an act which "may have the effect of curtailing the freedom to associate is subject to the closest scrutiny". The Court there also noted that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association". *Id.* Here the court of appeals simply ignored all such considerations without pausing to engage in any scrutiny, much less a careful balancing of its precedents against the free speech and other First Amendment guarantees implicated.

Denying Santa Fe's former employees their chosen method of recovering lost pension and health and welfare

benefits impinges on their right to freedom of association because it interferes with IMREA's *raisons d'etre* -- uniting volutarily for political advocacy while litigating its members' claims, all the while receiving representation by their attorneys of choice in the least expensive manner possible. The individual claims of many of Petitioner's members are not so grand that they could easily retain counsel to represent each one.

Under settled law Petitioner Association enjoys standing to proceed, pursuant to assignments of claims from its members, on the ERISA §510 cause of action for interference with their rights to receive pension and health and welfare benefits. *Misic v. Building Service Emp. Health Plan*, 789 F.2d 1374, 1378-79 (9th Cir. 1986) (health care provider had standing to sue under ERISA for recovery of unpaid heath insurance benefits, pursuant to a valid assignment). Unquestionably, IMREA's representation of its member's interest in this litigation satisfies the Article III requirements of case and controversy; the denial of standing abridges their freedom of association and adversely impacts their fundamental rights of free speech and petition.

CONCLUSION

Because the court of appeals' ruling *per curiam* conflicts with two recent holdings of the Court, as well as with decisions of at least two other circuits on issues relating to the continued security of retirement and other employment benefits, it is vitally important to the productive wheel horses of our society - the employed men and women of this Nation - that the Court grant certiorari to review the somewhat cavalier holdings of the *per curiam* opinion. The national operations of the railroad and transportation employers involved in this case, and maintenance of the express goal of ERISA to promote uniform regulation of pension and health and welfare plans, 29 U.S.C. §1001, strongly

counsel the Court to grant certiorari to achieve uniformity of decisional law under ERISA. On an even more fundamental level, the decision below disregards the precept that ours is a government premised on the separation of power among three equal branches. Its holding that a court may remedy an "inadvertent failure" of Congress in drafting legislation to change the plain language of a statute flouts the binding precedents of the Court. Of equal, if not greater significance is the detrimental effect wrought by the court of appeals upon the freedom of association and other First Amendment rights of the members of Petitioner in denying standing to sue to their voluntary citizens' group. The absence of any level of scrutiny upon this abridgement of fundamental rights by the court below further militates for the grant of a writ of certiorari.

Respectfully submitted,

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APPENDIX

Appendix I — Opinion of the United States Court of Appeals for the Ninth Circuit Filed March 27, 1996 ..... 1a

Appendix II — Order of the United States District Court for the Northern District of California Filed April 23, 1993 ..... 16a

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Appendix IV — Complaint Filed July 17, 1992 ..... 20a

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APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 27, 1996

United States Court Of Appeals
For The Ninth Circuit

No. 93-56400
D.C. No. CV-92-06623-WJR

Inter-Modal Rail Employees Association; Thomas Franks; Charles Jones; Thomas J. Martin; Hoyt Jarrard; Robert Stein,

Plaintiffs-Appellants,

v.

The Atchison, Topeka And Santa Fe Railway Company; In-Terminal Services, Division Of Mi-Jack Products, Inc., An Illinois Corp.,

Defendants-Appellees.

No. 94-55188
D.C. No. CV-92-06623-WJR

Inter-Modal Rail Employees Association; Thomas Franks; Charles Jones; Thomas J. Martin; Hoyt Jarrard; Robert Stein,

Plaintiffs-Appellants,

v.

The Atchison, Topeka And Santa Fe Railway Company; Santa Fe Terminal Services, Inc.,

Defendants-Appellees.

Appendix I

Appeals from the United States District Court for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted
March 6, 1995 — Pasadena, California

Filed: March 27, 1996

Before: JAMES R. BROWNING and ROBERT R. BEEZER, Circuit Judges, and Ancer L. Haggerty,* District Judge.

Per Curiam Opinion

SUMMARY

Labor and Employment/ERISA/ Litigation and Procedure (Civil)

The court of appeals affirmed in part a district court judgment reversed in part, vacated in part, and remanded. The court held that all Railroad Retirement Act plans are exempt from the Employee Retirement Income Security Act of 1974 (ERISA), and, thus, former employees' claim of interference with benefits due them under the Railroad Retirement Act of 1974 was properly dismissed.

Appellee Atchison, Topeka and Santa Fe Railway Co. transferred cargo handling work from a wholly-owned subsidiary, Santa Fe Terminal Services, Inc. (SFTS), to an independent corporation, appellee In-Terminal Services, Division of Mi-Jack Products, Inc. Employees of SFTS lost their jobs as a result of the transfer. The former employees

*Honorable Ancer L. Haggerty, District Judge, United States District Court for the District of Oregon, sitting by designation.

Appendix I

had been entitled to retirement benefits under the Railroad Retirement Act of 1974 and to pension, health, and welfare benefits under collective bargaining agreements.

Appellant Inter-Modal Rail Employees Association (the Association) represented the former SFTS employees. The Association and five of its members (collectively, the Plaintiffs) sued Atchison, SFTS, and In-Terminal (collectively, the Defendants), alleging that the Defendants violated ERISA by conspiring to transfer the work from SFTS to In-Terminal for the express purpose of depriving Association members of pension and welfare benefits. They also alleged that Atchison and SFTS violated the Federal Employer's Liability Act (FELA) by improperly exposing Association members to harmful levels of noise and toxic chemicals.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The court awarded attorneys' fees based on the premature filing by the Plaintiffs of a notice of appeal. The Plaintiffs appealed.

[1] The Association lacked standing to bring suit on the ERISA and FELA claims on its members' behalf.

[2] The Plaintiffs stated a claim under an ERISA section that protects participants in a plan from termination that is motivated by an employer's desire to prevent vesting of a pension.

[3] However, the Plaintiffs' claim of interference with their welfare benefits was properly dismissed. Welfare benefits do not vest. Employees have no present "right" to future, anticipated welfare benefits.

[4] The Plaintiffs' claim of interference with benefits due them under the Railroad Retirement Act of 1974 was also properly dismissed. An ERISA section excludes from coverage any "governmental plan," which

is defined as including "any plan to which the Railroad Retirement Act of 1935 or 1937 applies." All Railroad Retirement Act plans are exempt from ERISA.

[5] Failure to add a specific reference to the 1974 Railroad Retirement Act in the ERISA section was understandable. ERISA was enacted before the Railroad Retirement Act of 1974.

[6] A construction of the ERISA section that exempted all Railroad Retirement Act plans accorded with Congress' clear purpose and avoided anomalous results.

[7] There appeared to be no absolute legal bar to class certification of FELA claims. Dismissal of the FELA count before answer or discovery in this case was improper.

[8] Remand for appropriate findings was required in regard to the attorneys' fee award. The district court made no finding of recklessness or bad faith.

COUNSEL

Richard E. Schwartz and James E. Parrot, Richard Schwartz & Associates Ltd., St. Louis, Missouri, for the plaintiffs-appellants.

Ronald W. Novotny, Hill Farrer & Burrill, Los Angeles, California, for defendants-appellees The Atchison, Topeka and Santa Fe Railway Company and Santa Fe Terminal Services, Inc.

Robert L. Zaletel, Keck, Mahin & Cate, San Francisco, California, for defendant-appellee In-Terminal Services.

OPINION

PER CURIAM:

Inter-Modal Rail Employees Association and five of its members, plaintiffs below, appeal the dismissal of their complaint under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Federal Employer's Liability Act ("FELA") for failure to state a claim on which relief could be granted. In a related appeal, plaintiffs challenge an award of attorneys fees based on the premature filing by plaintiffs of an earlier notice of appeal.

I.

Defendant Atchison, Topeka and Santa Fe Railway Company transferred certain cargo handling work from a wholly-owned subsidiary, defendant Santa Fe Terminal Services, Inc., to an independent corporation, defendant In-Terminal Services Division of Mi-Jack Products, Inc.[1] The Association represents former employees of Santa Fe Terminal Services who lost their jobs as a result of the transfer. The complaint alleges (1) defendants violated Section 510 of ERISA by conspiring to transfer the work from Santa Fe Terminal Services to In-Terminal Services for the express purpose of depriving members of the Association of pension and welfare benefits;[2] and (2) Santa Fe Railway Company and Santa Fe Terminal Services violated

---

[1]Also named as a defendant is Santa Fe Pacific Corporation, alleged to have "exercised day-to-day management control over the affairs of its wholly-owed subsidiary, defendant [Santa Fe Railway Company]."

[2] 29 U.S.C. §1140 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary [of an ERISA plan] for exercising any right to which he is entitled...or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan...

FELA by improperly exposing members of the Association to harmful levels of noise and toxic chemicals.[3]

[1] To establish the individualized damages sought in both the ERISA and FELA claims, each employee member would have to participate in the lawsuit. *United Union of Roofers, Waterproofers & Allied Trade No. 40 v. Insurance Corp. of America*, 919 F.2d 1398, 1400 (9th Cir. 1990). The Association therefore lacks standing to bring suit on these claims on the members' behalf. *Id.* However, plaintiffs requested that if the Association were found not to be a proper party to act on behalf of its members, the named individual members be certified as representatives of a class to proceed with the action on behalf of members of the Association.

---

[3] 45 U.S.C. §51 provides:

Every common carrier by railroad while engaging in commerce between any of the several States...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...for such injury... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier...

II.

ERISA[4]

As employees of Santa Fe Terminal Services, the individual plaintiffs were entitled to retirement benefits under the Railroad Retirement Act of 1974, and to pension, health and welfare benefits under collective bargaining agreements with the Teamsters Union. As a result of their discharge, plaintiffs lost their Railroad Retirement Act benefits and suffered a substantial reduction in Teamster benefits. Plaintiffs allege defendants "entered into a wrongful conspiracy" to transfer the work from Santa Fe Terminal Services to In-Terminal Services "for the express purpose of avoiding" payment of contributions to the Railroad Retirement Fund and minimizing payments for Teamster benefits.[5]

---

[4] At Oral Argument, defendants raised for the first time a statute of limitations defense to plaintiffs' ERISA claims. We declined to consider the issue. *Rothman v. Hospital Service of Southern California*, 510 F.2d 956, 960 (9th Cir. 1975) ("It is well-established principle that in most instances an appellant may not present arguments in the Court of Appeals that it did not properly raise in the court below.").

[5] We reject In-Terminal Service's argument that section 510 does not support a cause of action against a non-employer for conspiring with an employer to interfere with ERISA-protected benefits. We held in *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1132 n.4 (9th Cir. 1992), that section 510 provides a cause of action against an insurer who "coerces an employer to fire an employee." We noted that section 510 imposes liability on "any person," not just "any employer," and rejected contentions that the statute's use of such terms as "discharge, fine, suspend, expel, discipline, [and] discriminate" suggest direct punitive action by one in a position to exercise control over the terms of employment. *See id.*; 29 U.S.C. §1140. We see no basis for distinguishing a coercive insurer from a successor such as In-Terminal who conspires with an employer to interfere with ERISA-protected rights. *But see Byrd v. MacPapers, Inc.*, 961 F.2d 157, 161 (11th Cir. 1992).

Appendix I

A. Teamster Benefits

1. Teamster Pension Benefits

[2] Plaintiffs clearly stated a claim under section 510 of ERISA, which "protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting." *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 143 (1990). Defendants contend that an incidental or consequential loss of future, unaccrued pension benefits is not actionable; but, as plaintiffs correctly note, questions of motivation and intent are not to be resolved at the pleading stage.

2. Teamster Welfare Benefits

[3] Plaintiffs' claim of interference with their welfare benefits was properly dismissed. It is the law of this circuit that section 510 "does not prohibit an employer from altering the package of medical benefits that it provides its employees, but only from interfering with an employee's use of the benefits provided." *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994).[6] Unlike pension benefits, welfare benefits do not vest. *See* 29 U.S.C. §1051(1); *Joanou v. Coca-Cola Company*, 98 F.3d 96, 98 (9th Cir. 1994); *West v. Greyhound Corp.*, 813 F.2d 951, 954 (9th Cir. 1987). Accordingly, employers "remain free to unilaterally *amend* or *eliminate* such plans without considering the employees' interests." *DeVoll*, 35 F.3d at 411 (quoting *Joanou*, 26 F.3d at 98); *see also* Joan Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510*

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[6]Other circuits have reached a contrary conclusion. *See Seaman v. Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir. 1993) ("The validity of a §510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge."); *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992) ("[T]he emphasis of a Section 510 action is to prevent persons and entities from taking actions which might cut off or interfere with a participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan.").

Appendix I

of ERISA Provide a Remedy?, 62 Notre Dame L. Rev. 1024, 1060 (1987) (noting that "[a]n employer can deprive employees of benefits and avoid liability under section 510 simply by terminating the medical and disability benefit plan entirely," rather than selectively terminating the coverage of individual employees). As we held in *West v. Greyhound Corp.*, 813 F.2d at 955, no action lies under section 510 for an employer's refusal to hire employees of its predecessor because the employees insist upon maintenance of previous benefit levels; existence of a present "right" is prerequisite to section 510 relief, and employees have no present "right" to future, anticipated welfare benefits. *Id.* at 954.

B. Railroad Retirement Act Benefits

[4] Plaintiffs' claim of interference with benefits due them under the Railroad Retirement Act of 1974 was also properly dismissed. Section 1003(b) of ERISA excludes from coverage any "governmental plan," defined as including "any plan to which the Railroad Retirement Act of 1935 or 1937 applies.") *See* 29 U.S.C. §1002(32). Plaintiffs argue that because Section 1002(32) does not refer to the Railroad Retirement Act of 1974, railroad retirement plans under the 1974 Act are not excluded from coverage by ERISA.[7] We conclude that all Railroad Retirement Act plans are exempt from ERISA. This construction is required to accomplish Congress' purpose and is not precluded by the inadvertent failure to specifically identify the 1974 statute in section 1003.

ERISA was adopted to meet a perceived need for minimum federal standards to govern private pension plans. *See* 29 U.S.C. §1001(a); H.R. Rep. No. 807, 93rd Cong., 2nd Sess., *reprinted in* 1974

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[7]Defendants also argue that a retirement plan under the Railroad Retirement Act is not an "employee benefit plan" within the meaning of §1003(b). Because the definition of "governmental plan" in §1003(b) explicitly includes "any plan to which the Railroad Retirement Act of 1935 or 1937" applies, §1003(b) necessarily contemplates that Railroad Retirement Act plans are "employee benefit plan[s]" within the coverage of the exemption.

U.S.C.C.A.N. 4670, 4676-81; H.R. Rep. No. 533, 93rd Cong. 2nd Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640-46. It is reasonable to assume plans under the 1935 and 1937 Railroad Retirement Acts were excluded from ERISA because such plans were already subject to independent federally administered statutory controls and were not plagued by the problems affecting private pension plans. This is equally true of plans adopted under the 1974 Railroad Retirement Act.

The benefit and contribution levels in plans under the 1974 Act are prescribed by that Act and regulations issued under it, *see* 20 C.F.R. §200.1 et seq., and are administered by the Railroad Retirement Board, an independent executive agency, *see* 45 U.S.C. §231 et seq., just as are plans issued under the two earlier revisions. Indeed, the 1974 Act added to the financial stability of Railroad Retirement Act plans and strengthened government controls over such plans, thus further diminishing any need for ERISA coverage. *See* S. Rep. No. 1163, 93rd Cong.,, 2nd Sess., *reprinted in* 1974, U.S.C.C.A.N. 5702, 5702-14; *U.S. Railroad Board v. Fritz*, 449 U.S. 166, 169 (1980).

[5] Failure to add a specific reference to the 1974 Railroad Retirement Act in section 1003 of ERISA was understandable. ERISA was enacted six weeks before the Railroad Retirement Act of 1974. *See* P.L. 93-406, 83 Stat. 832 (1974); P.L. 93-445, 88 Stat. 1305 (1974). Section 1002(32) of ERISA listed only the 1935 and 1937 Railroad Retirement Acts because they were the only Railroad Retirement Acts then in existence. Conversely, the 1974 Railroad Retirement Act was omitted not because of a deliberate decision that plans under the 1974 Act were not to be exempt from ERISA, but simply because the 1974 Railroad Retirement Act was not yet law.

Nor is it surprising that the need to anticipate passage of the 1974 Railroad Retirement Act and include a specific reference to that Act in ERISA would be overlooked. As Judge Dorsey pointed out in the only

reported decision on the subject,[8] the 1974 Railroad Retirement Act "codified and absorbed and superseded the Railroad Retirement Acts of 1935 and 1937." *Cornelio v. Consolidated Rail Corp.*, 385 F.Supp. 490, 491 (D. Conn. 1984). Consequently, "[t]he 1935 and 1937 Acts do not now exist as pure and separate legislative acts. They were absorbed into the 1974 enactment and now constitute one statute." *Id.* at 493; *See also* Historical Note, Subchapter IV, Railroad Retirement Act of 1974, 45 U.S.C. §231. In this context, the need to identify the most recent version of what was legislatively regarded as a single railroad retirement program would not have been obvious. Moreover, if the original Railroad Retirement Act and its two revisions are regarded as distinct, and section 1002(32) is "taken literally," ERISA "would exempt plans under statutes no longer existent, but not plans under the only [Railroad Retirement Act] now in the United States Code," a result that would "attribute to Congress a legislative non sequitur without rational explanation." *Cornelio*, 385 F.Supp. at 491.

The statutory language does not explicitly bar a reading of section 1002(32) that excludes from ERISA retirement plans under the 1974 Railroad Retirement Act. In view of the continuing nature of the Railroad Retirement Act program, it is not unreasonable to emphasize the reference to "the Railroad Retirement Act" in section 1002(32), rather than the reference to particular revisions, especially in light of the additional reference to funding through contributions fixed by "that Act." This reference to funding characterizes plans under all three Railroad Retirement Acts. Furthermore, in the legislative history dealing with exemption provisions in ERISA, Congress made no distinction between the various Railroad Retirement Acts, simply noting that plans under a Railroad Retirement Act were exempt from ERISA's coverage. H.R. Rep. No. 533, 93rd Cong., 2nd Sess. *reprinted in* 1974 U.S.C.C.A.N. 4639, 4713; H.R. Conf. Rep. 1280, 93rd Cong., 2nd Sess, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5043.

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[8]The absence of litigation may help explain the failure of Congress to amend §1002(32) of ERISA during the twenty years since it was adopted.

[6] Although admittedly not inescapable, a construction of section 1003 that exempts all Railroad Retirement Act plans accords with the clear purpose of Congress and avoids anomalous results.

III.

FELA

The district court granted defendants' Rule 12(b)(6) motion as to plaintiffs' FELA claims against Santa Fe Railway Company and Santa Fe Terminal Services for damages for work-related illnesses and injuries, holding that there can be no class actions under FELA as a matter of law. The court did not consider the propriety of class certification under Federal Rule of Civil Procedure 23.

[7] We know of no absolute legal bar to class certification of FELA claims.[9] The fact that the Employer's Liability Act, 45 U.S.C. §53, provides for reduction of damages in proportion to each employee's contributory negligence does not preclude class certification, though it may suggest certification is not desirable in some cases or that bifurcation may be required on the issue of damages. *See, e.g.*, Fed. R. Civ. P. 23(c)(4) (providing for partial class certification). The district court may well decide to deny class certification after analysis of the law and facts in light of the appropriate legal criteria, *see Nelsen v. King County*, 895 F.2d 1248, 1249 (9th Cir. 1990); *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974), but it did not do so here. Instead, the court pre-empted consideration of the issue on an appropriate record by dismissing the FELA count under Rule 12(b)(6)

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[9] *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1085-87 (9th Cir. 1975), merely held that certification was precluded under subdivisions (b)(1) and (b)(2) of Rule 23 for individual tort claimants seeking compensatory damages. As this court recognized in *In re Northern Dist. of California, Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852-56 (9th Cir. 1982), however, class treatment under subdivision (b)(3) may be proper for appropriately limited classes of tort plaintiffs.

before answer or discovery. This was improper. *Cf. Gillibeau v. City of Richmond*, 417 F.2d 426, 432 (9th Cir. 1969) (motion to dismiss for failure to state a claim is not a proper means of testing compliance with the pleading requirements of Rule 23).

IV.

Attorneys Fees

[8] The district court awarded Santa Fe Railway Company and Santa Fe Terminal Services attorneys fees against plaintiffs' attorneys under 28 U.S.C. §1927 for filing a premature notice of appeal. Fee awards under section 1927 must be based upon a finding that the attorney acted recklessly or in bad faith. *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986); *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 720 (9th Cir. 1984). The district court issued a tentative ruling denying fees on the ground that plaintiffs had acted mistakenly but neither recklessly nor in bad faith. The same day, at a hearing plaintiffs' counsel was unable to attend, the court granted the award. The court gave no explanation for its change of position and made no finding of recklessness or bad faith. Remand for appropriate findings is therefore required. *See Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982). *Cf. Kanarek v. Hatch*, 827 F.2d 1389, 1390-91 (9th Cir. 1987) (district court's statements embodied implicit determination that motion had been submitted recklessly or in bad faith).

* * * *

Dismissal of the ERISA count is affirmed except as to the allegations with respect to Teamster pension benefits. Dismissal of the FELA claims is reversed and remanded for reconsideration of the propriety of class treatment. The award of attorneys fees is vacated and remanded for factual findings on the issue of recklessness or bad faith.

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APPENDIX II — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED APRIL 23, 1992

Cause No. C 92-6623-WJR

UNITES STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, et al.,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

The motion to dismiss the complaint brought by defendants The Atchison, Topeka and Santa Fe Railway Company, Santa Fe Terminal Services, Inc., and In-Terminal Services, Inc. came on, for hearing before this Court on April 5, 1993. Appearing as counsel for defendants Santa Fe Railway and Santa Fe Terminal Services, Inc. were Ronald W. Novotny and Craig J. Whitney of Hill, Farrer & Burrill; appearing as counsel for defendant In-Terminal Services, Inc. was Steven Yang of Keck, Mahin & Cate; and appearing as counsel for plaintiffs was Richard Schwartz.

Appendix II

Based on the record and pleadings on file herein, the argument of counsel, and for the reasons included in but not limited to the Court's tentative ruling on the motions, the Court hereby orders as follows:

(1) Defendants' motions to dismiss plaintiffs' first and third claims for relief are granted, with prejudice; and

(2) Defendants' motion to dismiss the class allegations in plaintiffs' second claim for relief under the Federal Employers' Liability Act (FELA) is granted. Plaintiffs shall have leave to file an amended complaint not later than May 5, 1993 alleging an FELA claim on behalf of the five named individual plaintiffs only.

IT IS SO ORDERED.

Dated: April 23, 1993

s/ William J. Rea
UNITED STATES DISTRICT JUDGE

APPENDIX III — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 24, 1996

Not for Publication
United States Court Of Appeals
For The Ninth Circuit

No. 93-56400
D.C. No. CV-92-06623-WJR

Inter-Modal Rail Employees Association; Thomas Franks; Charles Jones; Thomas J. Martin; Hoyt Jarrard; Robert Stein,

Plaintiffs-Appellants,

v.

The Atchison, Topeka And Santa Fe Railway Company; In-Terminal Services, Division Of Mi-Jack Products, Inc., An Illinois Corp.,

Defendants-Appellees.

No. 94-55188
D.C. No. CV-92-06623-WJR

Inter-Modal Rail Employees Association; Thomas Franks; Charles Jones; Thomas J. Martin; Hoyt Jarrard; Robert Stein,

Plaintiffs-Appellants,

v.

The Atchison, Topeka And Santa Fe Railway Company; Santa Fe Terminal Services, Inc.,

Defendants-Appellees.

Appendix III

Before: BROWNING and [illegible]EZER, Circuit Judges, and,* District Judge.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* Honorable Ancer L. Haggerty, District Judge, United States District Court for the District of Oregon, sitting by designation.

APPENDIX IV — COMPLAINT
FILED JULY 17, 1992

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CHARLES JONES, THOMAS MARTIN,
HOYT JARRARD, AND ROBERT STEIN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, a non-profit, mutual benefit California corporation, and, in the alternative, THOMAS FRANKS, CHARLES JONES, THOMAS MARTIN, HOYT JARRARD, AND ROBERT STEIN, being the directors of said Association, for themselves and as representatives of the affected class of persons, who are members of the plaintiff Association,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Delaware corporation, SANTA FE TERMINAL SERVICES, INC., a Delaware corporation, SANTA FE PACIFIC CORPORATION, and IN-TERMINAL SERVICES DIVISION OF MI-JACK PRODUCTS, INC., an Illinois corporation,

Defendants.

Appendix IV

Cause No. C92-2808-MHP

Civil - Other Actions and Personal Injury

COMPLAINT FOR DAMAGES AND JURY TRIAL

1. Interference With Protected Rights In Violation of ERISA

2. Personal Injuries -- Federal Employers Liability Act

3. Retaliatory And Preemptive Discharge Relating To FELA Claims

Come now plaintiffs, and for their causes of action against defendants, state as follows:

1. On or about March 29, 1990, defendants and each of them wrongfully and intentionally caused employment loss, economic damages, personal injuries, and loss of health, welfare and pension benefits as well as Railroad Retirement Board benefits by discharging plaintiffs from their employment as drivers and cargo-handlers engaged in interstate commerce with defendant SANTA FE TERMINAL SERVICES, INC. ("SFTS"), in a railyard in the State of California operated and belonging to defendant THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ("ATSF").

JURISDICTION, VENUE, AND JURY DEMAND

2. Count I of the Complaint arises under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1132 et seq., and more specifically under 29 U.S.C. §1140. Jurisdiction herein is proper under 28 U.S.C. §1331 on the First Cause of Action.

3. Counts II and III arise under the Federal Employers Liability

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Act (FELA), 45 U.S.C. §§51, et seq. Jurisdiction is proper in this Court under the Second and Third Causes of Action pursuant to 28 U.S.C. §1331 and 45 U.S.C. §56.

4. Venue in this Court is proper under 28 U.S.C. §1391(a).

5. Plaintiffs demand that all issues in this case be tried by a jury, in accordance with the Seventh Amendment to the U.S. Constitution and Rule 38(b) of the Federal Rules of Civil Procedure.

THE PARTIES

6. Plaintiff INTER-MODAL RAIL EMPLOYEES ASSOCIATION ("IMREA") is a non-profit mutual benefit corporation organized and existing under the laws of the State of California, which was formed for the purpose of and has been authorized to conduct this litigation on behalf of approximately 200 former employees of defendant SFTS who lost their employment as a result of the wrongful conduct of defendants leading up to and culminating on March 29, 1990.

7. Alternative plaintiff THOMAS FRANKS is the President of IMREA, and alternative plaintiffs CHARLES JONES, THOMAS MARTIN, HOYT JARRARD, and ROBERT STEIN comprise the remainder of its board of directors. Plaintiff IMREA represents herein, pursuant to irrevocable assignments and powers of attorney, the former railyard employees of defendant SFTS described above.

8. Defendant THE ATCHISON, TOPEKA AND SANTA FE RAILROAD ("ATSF") is a Delaware corporation with its principal place of business in Topeka, Kansas. At all times relevant hereto, defendant ATSF exercised day-to-day management and control over the affairs of its wholly owned subsidiary, defendant SFTS.

9. Defendant SANTA FE TERMINAL SERVICES, INC., is

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a Delaware corporation with its principal place of business formally in Chicago, Illinois. At this time, defendant SFTS is an inactive corporation. At all times relevant, defendant SFTS was a wholly-owned subsidiary corporation under the day-to-day management and control of defendant THE ATCHISON, TOPEKA AND SANTA FE RAILROAD ("ATSF").

10. Defendant SANTA FE PACIFIC CORPORATION ("SFP Corp.") is a Delaware corporation with its principal place of business in Illinois. At all times relevant hereto, defendant SANTA FE PACIFIC exercised day-to-day management control over the affairs of its wholly-owned subsidiary, defendant ATSF.

11. Defendant IN-TERMINAL SERVICES DIVISION OF MI-JACK PRODUCTS, INC. ("ITS"), is an Illinois corporation with its principal place of business in Illinois. Defendant MI-JACK Products resides in the City and County of San Francisco, State of California, at 210 Fell Street.

ALTERNATIVE ALLEGATIONS AS TO PARTIES

12. In the event that this Court should for any reason find that plaintiff IMREA is not a proper party to bring or to proceed with this action on behalf of its members and their spouses, then plaintiffs THOMAS FRANKS, CHARLES JONES, THOMAS MARTIN, HOYT JARRARD and ROBERT STEIN would seek to be certified as class representatives of the members of IMREA, each one similarly situated, and to proceed with this action on their behalf, namely all those 200 former SFTS employees and members of IMREA who were terminated from their employment by the wrongful actions of defendants leading up to and culminating on March 29, 1990. Class action certification would be then proper for the following reasons:

(a) the persons in this proposed class are so numerous that joinder of all of them is impracticable;

(b) disposition of the claims to be asserted herein by IMREA in a class action would be of benefit to the parties and to the Court in the event that this Court should at any time determine that plaintiff IMREA is not a proper party to conduct this litigation on behalf of its members and their spouses;

(c) the claims of the named plaintiffs are typical of the class. Members of the class consist entirely of former employees of SFTS and their spouses. All the proposed representatives of the class held blue-collar jobs and traditionally male positions in the same freight yard of defendant ATSF as drivers and cargo-handlers. Further, the jobs of all the proposed representatives of the affected class and the jobs of all members of the affected class are currently held by employees of defendant ITS pursuant to the below-described wrongful scheme entered into and effectuated by defendants to interfere with plaintiffs' rights to receive Railroad Retirement Board and Teamsters' pension benefits as well as health and welfare benefits, all as protected by 29 U.S.C. §1140, by discharging plaintiffs for the purpose of interfering with those rights;

(d) plaintiffs as class representatives will fairly and adequately represent the interests of the class; and

(e) there is a well-defined community of interest on the questions of law and fact presented by this case.

FACTUAL BACKGROUND

13. At all times prior to their discharge in March 1990, plaintiffs worked as employees of defendant SFTS at a railroad terminal, called the Hobart Yard, located in Los Angeles, California. Said railroad terminal was owned at all relevant times by defendant ATSF, and most

of the work in the Hobart Yard was performed by direct employees of ATSF.

14. The plaintiff class members include truck drivers and cargo handlers. They were hired to do intermodal work by defendant SFTS at the Hobart Yard, including ramp, de-ramp, and hostling, and had performed that work for a number of years prior to March 1990.

15. Defendant SFTS, a wholly-owned subsidiary of defendant ATSF, was formed for and its sole purpose was to do the loading and unloading work at the Hobart Yard. Defendant SFTS did that work from 1974 through March 1990.

16. At no time prior to January 1990 did a contract exist between defendants SFTS and ATSF for performance of ATSF's work at the Hobart Yard. At all times relevant, defendant SFTS' sole source of revenue was work for defendant ATSF.

17. In 1974, the Railroad Retirement Board found defendant SFTS to be an "employer" covered by the Railroad Retirement Act, 45 U.S.C. §§231 et seq. As such, defendant SFTS made contributions on behalf of each plaintiff to the Railroad Retirement Fund. Those employer contributions paid by defendants SFTS and indirectly by defendant ATSF totalled approximately $6,300 per employee per year. That level of contribution greatly exceeded that which non-railroad employers were required to contribute to the Social Security funds.

18. At all times relevant, defendant SANTA FE PACIFIC, the parent of defendant ATSF, sponsored an employee benefit program. Defendant SFTS, as an affiliated company of defendant SANTA FE PACIFIC, was part of the SANTA FE PACIFIC benefit program. All SFTS employees, including plaintiffs, were covered by the SANTA FE PACIFIC employee benefit program.

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19. As part of plaintiffs' benefits package during their employment with defendant SFTS, they received substantial contributions from their employer paid over to a Teamsters Union health and welfare benefit fund, a Teamsters pension fund, a Teamsters supplemental benefit trust fund, and to the Railroad Retirement Board. In addition, while employed by defendant SFTS, plaintiffs received substantial paid vacation time and sick leave pay.

20. In January 1990 a meeting was held between six members of plaintiff IMREA and members of the management of defendant SFTS. At that meeting, the SFTS management represented to the six employees who now belong to IMREA that defendant SANTA FE PACIFIC was spending millions of dollars to modernize the Hobart Yard, and to make it larger and more efficient so that more workers would need to be hired. Further, the management representatives from defendant SFTS represented to the six plaintiffs that their jobs were secure, and that they should tell their fellow employees about their job security and defendant SFP Corp.'s plan to make defendant SFTS the leading "piggy-back" and container hauler in the country. During said meeting, there was absolutely no mention that SFTS would go out of business just two months later, that its work would or might be taken over by defendant ITS, or that plaintiffs would lose substantial employment benefits when SFTS ceased operating at the Hobart Yard.

21. On or about January 1, 1990 defendant ATSF and defendant SFTS entered into a contract, termed a "Service Agreement", whereby defendant ATSF engaged defendant SFTS to perform the unloading and loading work at the Hobart Yard. This was the first time ever that a written contract was put into effect between defendant ATSF and SFTS for performance of the Hobart Yard work. During the previous two decades, defendant ATSF simply set up defendant SFTS and it then did all ATSF's intermodal work. Said 1990 contract provided that SFTS could be terminated in the event that defendant SFTS' services became "unsatisfactory" to ATSF. The contract otherwise had an indefinite duration.

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22. On February 22, 1990, less that two months after the contract was signed, defendant ATSF notified defendant SFTS that it was exercising its "right" to terminate the contract. No reason was given why the contract was terminated. Defendant ATSF, however, then invited defendant SFTS to submit a "bid" to perform the unloading and loading work at the Hobart Yard.

23. On February 23, 1990, defendant SFTS informed the Teamsters Union, representing plaintiffs herein, that its "customer" at the Hobart Yard, defendant ATSF, was or would be soliciting from other contractors bids for the work performed by SFTS at the Hobart Yard. SFTS told the Teamsters Union that it might "have to cease" operations at the Hobart Yard, and that all Teamsters Union positions, including those held by the members of plaintiff IMREA possibly could be abolished as of March 31, 1990. This was the first time that defendant ATSF ever raised the possibility that a company other than one of its wholly-owned subsidiaries would perform the intermodal work at the Hobart Yard.

24. On March 19, 1990 defendant ATSF informed defendant SFTS that it was not the successful "bidder" on the Hobart Yard contract. This occurred at least three days after defendant ITS had learned that it was the "successful bidder".

25. After defendant ITS was given the contract for the Hobart Yard work, defendant SFTS sold its Hobart Yard assets, including machinery and trucks, to ITS for a nominal sum on concessional credit terms.

26. On March 19, 1990 defendant ITS informed plaintiffs that ITS had been "awarded" the contract to operate the Hobart Yard facility on March 16, 1990. At that time, both ITS and defendant ATSF invited plaintiffs to apply for positions with ITS.

27. On March 29, 1990 defendant SFTS informed plaintiffs that as of March 31, 1990 they would be discharged from their employment.

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28. Some time after plaintiffs were informed by defendant ITS that it would take over operations at the Hobart Yard, plaintiffs were told by management personnel from defendants SFTS and ATSF that the reason why SFTS no longer was to operate the intermodal operations in ATSF's Hobart Yard was that it cost too much for "the railroad" to continue paying Railroad Retirement Board taxes and contributions for the plaintiffs' RRB benefits.

29. After their discharge by defendant SFTS, plaintiff FRANKS and many of the other members of plaintiff IMREA were hired by defendant ITS to do exactly the same work at the same place for the same railroad, defendant ATSF. But after ITS took over, it refused to continue to pay into the Railroad Retirement Fund on behalf of plaintiffs.

30. Upon their discharge by defendant SFTS in March 1990, plaintiffs lost vacation pay, their hourly wage rate was reduced, holidays and sick leave time were cut, they lost all employer contributions to the Railroad Retirement Board and their continued participation in the RRB system (and thus became eligible only for Social Security benefits), they lost job security and had to go through a probationary period of 30 days (even though many of the employees had been with SFTS for over ten years), and they suffered a reduction of contributions to and benefits from their pension plan and health and their welfare plan.

31. Defendant SFTS has admitted that the reason its contract to perform the work at the Hobart Yard was awarded to defendant ITS was for defendants SANTA FE PACIFIC and ATSF to avoid the higher wage costs paid to plaintiffs while they were employees of SFTS by the avoidance of payments to the Railroad Retirement Board on behalf of the members of plaintiff IMREA which it and defendant ATSF had made while they were employed by defendant SFTS.

32. On October 31, 1990 the Railroad Retirement Board found that defendant ITS was not an "employer" under the coverage of the Railroad

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Retirement Act 45 U.S.C. §§231, et seq. Therefore defendants SANTA FE PACIFIC, ITS and ATSF had avoided the requirement for ATSF to pay into the Railroad Retirement Fund on behalf of plaintiffs, by virtue of their having "awarded" the Hobart Yard intermodal contract to defendant ITS.

33. Some time prior to March 29, 1990 the defendants, and each of them, entered into a wrongful conspiracy to change the contract to perform ATSF's intermodal work at the Hobart Yard over to defendant ITS for the express purpose of avoiding payment of monies for RRB benefits into the Railroad Retirement Fund, and thus to avoid paying higher pension and health and welfare benefits to plaintiffs, all which had been required when plaintiffs were employees of defendant SFTS. Defendants had no legally justified reason to "award" the Hobart Yard contract to defendant ITS.

FIRST CAUSE OF ACTION
(Interference With Protected Rights In Violation Of ERISA)

34. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 7 above.

35. From 1974 through March 1990, the members of plaintiff IMREA had a business and/or employment relationship or expectancy with defendant SFTS whereby they were legally entitled to and were receiving benefits in the form of salary, health insurance, pension, vacation days, sick leave, and holiday pay, as well as Railroad Retirement Act benefits. In addition, plaintiffs had a legitimate expectation of advancement and long-term continued employment with defendant SFTS.

36. At all times relevant to this cause of action, defendants ATSF, SANTA FE PACIFIC, and ITS had knowledge of plaintiffs' employment relationship and expectancy with defendant SFTS.

37. At some time prior to March 29, 1990, defendants, in violation of 29 U.S.C. §1140, agreed and conspired to intentionally interfere with plaintiffs' employment relationship and legitimate expectancy of continued employment for the express purpose of depriving plaintiffs of most, if not all of the substantial, ERISA-protected "fringe" benefits of their employment with SFTS, as alleged in the proceeding paragraphs.

38. The members of plaintiff IMREA who were hired later by defendant ITS received substantially lower ERISA-protected employment "fringe" benefits than what they had received when they were employed by defendant SFTS. In particular, defendants completely avoided charges to defendant ATSF for the making of contributions on behalf of plaintiffs to the Railroad Retirement Fund when they combined and conspired to discharge plaintiffs as SFTS employees and to bring in defendant ITS to perform the intermodal work at the Hobart Yard, all without any legal justification.

39. As a direct and proximate result of defendants' aforesaid actions in violation of 29 U.S.C. §1140, the members of plaintiff IMREA suffered the losses complained of in Paragraph 30 above by reason of which they are entitled to recover of the defendants consequential and liquidated damages.

40. The actions of defendants were willful, wanton, intentional, oppressive and outrageous, justifying the imposition of punitive damages in an amount sufficient to deter defendants and others from like conduct in the future.

SECOND CAUSE OF ACTION
(Personal Injuries --
Federal Employers Liability Act)

41. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 40. This Second Cause of Action is against

defendants ATSF and SFTS only.

42. During the course of plaintiffs' employment with defendant SFTS, all or part of their duties were in furtherance of and did closely, directly and substantially affect defendant ATSF's and defendant SFTS' activities in interstate commerce, with the result that the rights and liabilities of the parties under this Second Cause of Action were and are governed by the Federal Employers Liability Act (FELA), 45 U.S.C. §§51, et seq.

43. During the course of their employment by defendant SFTS at defendant ATSF's Hobart Yard railroad loading and unloading facility, plaintiffs worked in the open air at the rail facility. In the course of said employment, plaintiffs were continually and repeatedly exposed to toxic chemicals from the open-air combustion of batteries and heavy metal components of batteries at the Gould Electronics Corporation business, located across the street from the Hobart Yard. To this day, those members of plaintiff IMREA who work at the Hobart Yard for defendant ITS continue to be exposed to toxic chemicals from that same source.

44. Furthermore, during the course of their employment at the Hobart Yard, plaintiffs were continually and repeatedly exposed to loud noises, harmful to humans, emanating from defendants ATSF's rail cars and switching operations, and from defendant SFTS' machinery and trucks located at the Hobart Yard job site. To this day, those plaintiffs who work at the Hobart Yard for defendant ITS continue to be exposed to dangerously high levels of noises.

45. At all times relevant, plaintiffs were unaware of the dangerous propensities of the loud noises to which they were exposed in the course of their employment at the Hobart Yard, and were unable to take any effective measures or actions to limit or to minimize any potential dangers caused by their exposure and/or proximity to said toxic chemicals and loud noises.

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46. Defendants SFTS and ATSF, by and through their duly authorized agents, servants and employees, were guilty of one or more of the following negligent acts or omissions in violation of the FELA, to wit:

(a) in failing to provide plaintiffs with a reasonably safe place within which to work;

(b) in failing to warn plaintiffs that they had been and continued to be exposed to toxic and harmful chemicals from the burning of batteries and heavy metal components across the street from their jobsite;

(c) to furnish plaintiffs with safe and suitable tools, ventilation equipment, protective clothing, eye and face protection, protective inhalation devices, and/or adequate noise filtering devices;

(d) in failing to warn plaintiffs of the precise, true nature and hazardous effects from their exposure to toxic chemicals and harmful substances resulting from the burning of batteries and heavy metal components in the course of their employment at the Hobart Yard, when defendants knew or should have known of such hazardous substances and effects;

(e) in failing to warn plaintiffs of the precise and true hazardous effects of exposure in the course of their employment to prolonged high noise levels when defendants knew or should have known of the hazards of same;

(f) in failing to provide instructions or a method for working around said toxic and harmful substances and around said harmful noise levels; and

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(g) in failing to monitor or test the worksite for the presence of loud noises harmful to humans and to test for toxic substances before and/or while requiring plaintiffs to work at the Hobart Yard.

47. That as a direct and proximate result, in whole or in part, of any one or more of the negligent acts pleaded in the foregoing Paragraph by defendants SFTS and ATSF, plaintiffs suffered loss of hearing by repeated exposure to very high noise levels.

48. As a further direct and proximate result, in whole or in part, of one or more of the foregoing negligent acts or omissions by defendants SFTS and ATSF, plaintiffs suffered exposure to toxic substances which caused them to sustain injuries to their skin, nervous system, psychological well-being, and internal organs, resulting in their impairment and disability, and creating the need for medical supervision, monitoring and treatment.

49. As a further direct and proximate result, in whole or in part, of one or more of defendants SFTS and ATSF's negligent acts set forth above, plaintiffs have suffered anxiety, post-traumatic stress disorder and/or post-traumatic depression, and they continue to suffer a well-founded belief or fear known as "cancerphobia" that they have or will contract some form(s) of cancer because of their toxic chemical exposures. As a further result of defendant SFTS and ATSF's acts or omissions, plaintiffs enjoyment of life and earning capacity have been reduced and their expected life-spans have been greatly shortened. As a further result of their health problems, plaintiffs will be forced to incur costly medical treatment and monitoring expenses in the future in their efforts to monitor and treat their condition, all in amounts as yet to be determined.

50. Before their exposures to the aforesaid hazards, plaintiffs were strong and able-bodied men and were at all times gainfully employed. As a result of the negligent acts or omissions of defendants ATSF and

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SFTS, plaintiffs have suffered damages by way of lost wages and/or diminished earning capacity, and diminished ability to render services, society, affection and counseling to their families.

THIRD CAUSE OF ACTION
(Retaliatory And Preemptive
Discharge Relating To FELA Claims)

51. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 50 above.

52. A secondary motive of defendants' unlawful conspiracy to shift the "contract" for the intermodal work at the Hobart Yard from SFTS to ITS through the discharge of plaintiffs from their employment with SFTS, was for defendants SFTS and ATSF to limit their liability under the FELA for plaintiffs' hearing loss and damages from exposure to toxic chemicals.

53. Defendants feared that plaintiffs would make claims against defendant SFTS under FELA and wrongfully conspired to discharge plaintiffs from their employment with defendant SFTS so as to limit or evade their liability to plaintiffs under FELA because plaintiffs would no longer be covered under the FELA for personal injuries suffered during the course of their employment at the Hobart Yard rail facility. Defendants wrongful conspiracy to discharge plaintiffs from their employment with SFTS, and the shifting of plaintiffs' jobs to defendant ITS, an employer not covered under the FELA, was an attempt to leave plaintiffs only with state Workers' Compensation coverage as their sole remedy for personal injuries suffered in the course of their employment.

54. Those members of plaintiff IMREA who were hired by defendant ITS in April 1990 continue to suffer personal injuries resulting from exposure to high noise levels and to toxic chemicals up to the present, but because of their wrongful discharge from SFTS, they no longer are covered under the FELA.

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55. As a direct and proximate result of defendants' intentional, wrongful discharge of plaintiffs from their employment with defendant SFTS, plaintiffs were damaged as alleged in Paragraphs 30, 39 and 48-50 above.

56. The actions of defendants were willful, wanton, intentional, oppressive and outrageous, justifying the imposition of punitive damages in an amount sufficient to deter them and others from like conduct in the future.

WHEREFORE, plaintiff IMREA prays for judgment against defendants:

1. For general damages in amounts sufficient to fairly and adequately compensate the members of IMREA for all their consequential losses and for all their injuries; according to proof at trial.

2. For liquidated damages.

3. For punitive damages in an amount to be determined by the jury.

4. For prejudgment interest.

5. For reasonable attorneys' fees.

6. For their costs herein.

7. For such further relief as the Court deems just and proper.

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DATED: July 17, 1992

RICHARD SCHWARTZ &
ASSOCIATES, LTD.
s/Richard E. Schwartz
Richard E. Schwartz
James E. Parrot
Counsel for Plaintiffs

APPENDIX V —AFFIDAVIT OF R. M. DUSHEK DATED SEPTEMBER 26, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 89-5905 KN (EX)

MARILYN MOSS,

Plaintiff,

vs.

SANTA FE PACIFIC CORP., ET AL.

Defendants.

Affidavit of R. M. Dushek

R. Dushek, being first duly sworn on oath, deposes and states as follows:

1. I am employed as President and Chief Operating Officer of Santa Fe Terminal Services, Inc. ("SFTSI"), a Defendant in this proceeding. I have held this position since January 1, 1990. From August 1, 1989 through December 31, 1989, I served continuously as Vice President of SFTSI.

2. As President of SFTSI, I am responsible for managing all operations of SFTSI, I also have access to all files and records maintained by SFTSI in the regular course of its business. The facts which I recite below are drawn either from my personal knowledge or my review of those files and records.

3. Per the order of this Court, attached to my Affidavit as Exhibits RMD-1 through RMD-4 are SFTSI's Balance Sheets for the dates

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December 31, 1988; December 31, 1989; December 31, 1990; and August 31, 1991. The Balance Sheets reflect, among other things, SFTSI's total assets, liabilities and shareholder's equity as of these four dates. Set forth below is a table summarizing the major aspects of the Balance Sheets, rounded to the nearest hundred thousand dollars:

Date	Assets	Liabilities	Shareholder's Equity
Dec. 31, 1988	$30.3 million	$13.2 million	$17.0 million
Dec. 31, 1989	$20.3 million	$10.1 million	$10.1 million
Dec. 31, 1990	$ 7.2 million	$ 3.1 million	$ 4.1 million
Aug. 31, 1991	$ 5.0 million	$ 1.4 million	$ 3.5 million

4. SFTSI's decrease in assets, liabilities and shareholder's equity as reflected above is due directly to its loss of major service contracts at Los Angeles, California (March 31, 1990); Richmond, California (June 30, 1990); and Chicago, Illinois (February 16, 1991). These contracts were lost by SFTSI in the ordinary course of business through a competitive bidding process.

5. The recent decline in SFTSI's business operations has nothing whatsoever to do with the filing or existence of the lawsuit filed against SFTSI by Plaintiff Moss. Rather, SFTSI has become unable to provide ramping and deramping services on as cost efficient a basis as its competitors. In my opinion, the two major reasons leading to SFTSI's loss of business at the three above-named locations were: (1) the higher wages SFTSI was required to pay its employees under applicable collective bargaining agreements; and (2) the Internal Revenue Service's requirement that SFTSI pay higher railroad retirement taxes, while its competitors operate under the social security system. Roughly, SFTSI under the railroad retirement- system is obligated to pay over $6,300 per year per employee more in retirement taxes than does its competitors under the social security system.

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6. I understand the Court has also ordered me to address whether SFTSI is in the process of selling or liquidating its assets. In instances where SFTSI loses a ramping/deramping contract, it routinely sells the assets used in performing a contract to the new contractor for fair market value. SFTSI had no affiliation whatsoever with the three separate entities that replaced it at Los Angeles, Richmond and Chicago.

SFTSI also leases truck trailers and containers on a very limited basis. SFTSI is currently attempting to sell such equipment for fair market value as opportunities arise.

7. Although SFTSI is not currently party to any contracts for ramping and deramping services, there is no intent to dissolve the corporation. In fact, SFTSI is party to a lawsuit against the IRS in which we seek a railroad retirement tax refund of approximately $20 million. If SFTSI prevails in this lawsuit, in my opinion it again will be able to bid on a competitive basis to, provide ramping and deramping services to railroads.

8. I also understand the Court has expressed concern over whether SFTSI would be able to satisfy any judgment awarded to its former employee Ms. Moss should she prevail in this litigation. While SFTSI is in a position to satisfy any award of damages to Ms. Moss up to at least $3.5 million (such amount being SFTSI's shareholder's equity as of August 31, 1991), SFTSI would consider posting a bond in a reasonable amount to guarantee the payment of any damages awarded Plaintiff Moss should the Court consider such a course of action neeessary.

FURTHER AFFIANT SAYETH NOT

s/R. H. Dushek

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Subscribed and Sworn to
before me this 26th day
of September, 1991.
s/R. E. Anderson
Notary

"Official Seal"
R.E. Anderson
Notary Public, State of Illinois
My Commission Expires 7/1/95